1948 *Present :* **Dias and Gratiaen JJ.**

DHARMADASA, Appellant, *and* MERAYA, Respondent

S. C. 389—D. C. Panadure, TK 525/25,438

Civil Procedure Code—Partition action—Amendment of final decree—Accidental slip or omission—Failure to notice reservation of life interest in deed—Jurisdiction to amend—Res judicata—Section 189.

A partition action proceeds on oral as well as documentary evidence and the failure to notice the reservation of a life interest in a deed is an accidental slip or omission which gives the Court jurisdiction to amend the decree under section 189 of the Civil Procedure Code. Where a decree is so amended with notice to the parties it is *res judicata* and cannot be attacked in a collateral action.

APPEAL from a judgment of the District Judge, Panadure.

E. B. Wikramanayake, K.C., with *H. Wanigatunga*, for plaintiff, appellant.

H. W. Jayewardene, for defendant, respondent.

Cur. adv. vult.

November 23, 1948. DIAS J.—

The plaintiff-appellant and his deceased wife owned an undivided share in a land called Koskandewatta or Batadombagahawatta. They by their deed P2 of 1927, reserving to themselves a life interest, donated that share to their three children including the defendant-respondent.

The main *corpus* was partitioned in D. C. Kalutara 20,286. In his plaint the appellant recited the deed P2 and disclosed the fact that he claimed a life interest over the share donated by that deed. When giving evidence regarding the devolution of title at the trial of the partition case, the appellant produced the deed P2 (marked P7 in that case), but the record does not show that he made any mention of the life interest

which was clearly reserved in that deed. The result was unfortunate; because neither the interlocutory decree D4, nor the final decree P3 reserved to the appellant his life interest over the divided lot 7 which was allotted to his daughter the respondent (6th defendant in the partition action).

Within a month after the final decree was entered, however, the plaintiff with notice to the respondent applied to amend the decree. The respondent, though personally served with notice, failed to appear, and the Judge, who was not the Judge who tried the case, allowed the amendment which was incorporated in the final decree P3. No appeal was taken against the order allowing the amendment.

Three years later the respondent filed proxy and without any notice to the appellant, who was in possession of lot 7, obtained a writ of possession and ejected the appellant, who thereupon moved to be restored to possession. For some reason, which is not clear, the appellant's counsel did not press this application, which was, consequently, dismissed without costs. The appellant, thereupon, filed the present action against the respondent. The District Judge dismissed his action holding that the amendment of the final decree P3 was bad and made without jurisdiction, and that the dismissal of the appellant's application to be restored to possession operated as a bar to his present action. From that judgment the plaintiff appeals.

I cannot agree with the District Judge that the Court in the partition action had no jurisdiction to amend the final decree P3. His reasons for so holding are that there was no "accidental slip or omission", and that the mistake arose because the appellant when giving evidence failed to refer to his life interest. The District Judge, however, has overlooked the fact that the partition action proceeded on oral *as well as on documentary evidence*. The deed P2 (P7) clearly indicated that the plaintiff had a life interest over the share which was donated. In a partition case it is the duty of the trial Judge to investigate the title, and not merely to go on what the plaintiff says, or is made to say, when he is outlining the pedigree. Had the trial Judge done what he ought to have done, and studied the documentary evidence in the case, he would not have failed to notice that the share of the respondent was subject to the life interest of the plaintiff. Clearly, therefore, there has been a "slip or omission" in allotting the shares of the respondent and the plaintiff. Obviously, that slip or omission was not deliberate. It was *accidental*. The cases of *Silva v. Silva*[1] and *Silva v. Silva*[2] indicate that a decree in a partition case can be amended under section 189 of the Civil Procedure Code. Jayawardene in his book on Partition says at page 156: "A final decree for partition may be amended if there has been a clerical error. There is nothing in section 189 which limits the time within which such amendment can be made". Section 189 was subsequently repealed and re-enacted in its present form by Ordinance No. 26 of 1930. This amendment widened the powers of the Court to give relief under section 189. Not only may the Court at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order, but it can

[1] *(1910) 13 N.L. R. 87.* [2] *(1912) 15 N.L.R. 146.*

also amend any error arising therein from " any accidental slip or omission ", or may make any amendment which is necessary to bring a decree into conformity with the judgment. Before making such an amendment, however, the Court shall in all cases give reasonable notice to the parties or their proctors.

The District Judge holds that the Judge who allowed the amendment was not the Judge who delivered the judgment on which the interlocutory decree was based, and that " he did not allow the amendment because of an *accidental* error or omission ". The judgment was delivered and the interlocutory decree was signed by Mr. T. F. C. Roberts, District Judge. The amendment was allowed by his successor Mr. L. W. de Silva, District Judge. Section 88 of the Courts Ordinance empowers the successor of a Judge to continue a case commenced or dealt with by his predecessor. When Mr. L. W. de Silva allowed the application to amend the final decree he was obviously acting under section 189. There was no clerical or arithmetical error to correct. He was not bringing the decree into conformity with the judgment. He was correcting a " slip or omission ". Mr. L. W. de Silva had before him the fact, which the Judge from whose judgment this appeal is taken has not appreciated, that there was documentary evidence before Mr. T. F. C. Roberts proving conclusively that this plaintiff was entitled to a life interest over the divided block 7. Obviously, Mr. T. F. C. Roberts did not make " the slip or omission " which he did, in fact, make deliberately. It was a pure accident. Furthermore, Mr. L. W. de Silva had jurisdiction to act under section 189. Thereupon it was open to him to make a right order or a wrong order. If he made a wrong order, which I do no not think he did, the remedy of the respondent was to appeal therefrom. Not having done so, the order binds her as it is an *inter partes* order. I hold that the amendment of the decree was lawful and is binding on the respondent.

This amendment of the decree was made in October, 1941. It was done after due notice to the respondent. She waited until January, 1944, when a proctor filed her proxy and moved for a writ of possession. It is incredible how any proctor could make such an application with the earlier journal entries and the amended decree staring him in the face. Had the respondent and her legal advisers displayed ordinary diligence, they ought to have realized that the appellant was in possession under a decree of the Court, and that before applying for the writ of possession—assuming that such a writ can be issued in a partition action[1] —they should have drawn the attention of the Court to that fact, and moved that a notice should issue on the party in possession in the first instance, to show cause why he should not be ejected. The respondent, obviously, could not take such steps, because the amended decree binds her, and her application for a writ of possession would have been rejected out of hand. There is here a distinct element of fraud which, in my opinion, affects all the subsequent proceedings. The Court was induced to issue the writ of possession by a concealment of material facts. The application was made *ex parte*

[1] See *Vengadasalem v. Chettiyar (1928) 29 N. L. R. 446, Hadjiar v. Mohamedu (1917) 4 C. W. R. 371, and Fernando v. Cathirivelu (1927) 28 N. L. R. 492.*

when notice ought to have issued in the first instance on the appellant who was in possession. His ejectment under such circumstances was unlawful. He, in turn, had to adopt a procedure which is questionable in order to regain possession. When the appellant's application came up for inquiry, his counsel did not press the application which was, therefore, dismissed without costs.

Section 328 cannot apply to a case of this kind. Both the appellant and the respondent are decree holders—the former with the right to immediate possession, and the latter with the right to possession on the death of the appellant. The District Judge holds that the plaintiff's application under section 328 having been dismissed, this debars him from claiming in a subsequent proceeding against the same party the right to the possession of the same property. Ordinarily that may be so, but in cases where one of the parties by fraud has succeeded in ejecting the person lawfully entitled to be in possession of a land, and compels that other to seek the aid of the Court to regain possession, and who then withdraws the application because the matter cannot be dealt with in that way, in my opinion the withdrawal of the application under such circumstances cannot operate as a bar to the present action. There has been no adjudication on the merits of the appellant's claim to be restored to possession. He has neither said nor done anything which has detrimentally affected the respondent's position. I am, therefore, of the view that the finding of the learned District Judge cannot be supported. To do so would be to enable the respondent to take advantage of her own fraud.

The judgment and decree appealed against are set aside. I enter judgment for the plaintiff as prayed for with damages which were agreed on at Rs. 25 per mensem. The plaintiff will have his costs both here and below.

GRATIAEN J.—I agree.

Appeal allowed.